

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

MARGIE F. CUNNINGHAM AND FRED D.
CUNNINGHAM, INDIVIDUALLY AND ON
BEHALF OF OTHERS SIMILARLY SITUATED
Plaintiffs

V.

NO. 4:95CV417-B-B

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY

Defendant

MEMORANDUM OPINION

This cause of action comes before the court upon the defendant's motion to dismiss. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiffs, a retired couple, purchased a pair of life insurance policies in August of 1985 from the defendant, Massachusetts Mutual Life Insurance Company ("Mass Mutual"). Since the plaintiffs expressed concern regarding whether or not they could pay the premiums on a life insurance policy for the remainder of their lifetimes, the Mass Mutual representative introduced them to the "vanishing premium" policy. "Vanishing premium" is a generic term for life insurance policies which require only a limited number of premium payments before the earnings on the cash value of the policy are sufficient to pay the cost of the insurance. Thus, after the prescribed number of years (sometimes

as few as one year) the premiums "disappear." The vanishing premium policies purchased by the plaintiffs carried a face value of approximately \$67,000.00 on the policy purchased by Fred Cunningham and approximately \$108,000.00 on the policy purchased by Margie Cunningham. The plaintiffs allege that the Mass Mutual agent who sold them the policies presented illustrations showing that by making premium payments of \$3000.00 per year, per policy, Mr. and Mrs. Cunningham's policies would be permanently paid up, and would require no further premiums after ten years and eleven years, respectively. The plaintiffs maintain that the Mass Mutual representative assured them that no additional premiums would be due after the "Crossover Ages" identified in the sales illustrations.

On December 6, 1985, the defendant, responding to an inquiry from the plaintiffs, wrote the plaintiffs a letter which stated in part, "current dividend scales are not guaranteed...but Mass Mutual has a very strong record in terms of meeting dividend scales illustrated to its policyholders at the time of sale." In 1993, the plaintiffs received an in-force illustration with a note from the defendant stating that Fred Cunningham's policy had "already crossed over, so it's NPay."¹ On May 25, 1994, the defendant wrote to the plaintiffs, again assuring them that Mr. Cunningham's policy had already passed the crossover point. Finally, in 1995, the

¹ The exact meaning of the term "NPay" is unknown.

defendant notified the plaintiff's that even though Mr. Cunningham's policy had reached the crossover point, the annual dividend would not exceed the cost of the premiums for several more years. Mr. Cunningham was told that he would have to continue paying premiums for several more years or accept a reduced death benefit. Mrs Cunningham was told that she, too, would have to continue paying premiums for at least six more years. Since they were unable to make the premium payments, the plaintiffs cancelled their policies.

In December of 1995, the plaintiffs filed suit against Mass Mutual for various claims including fraud, negligent misrepresentation, intentional interference with contract rights, negligence and deceptive sales practices. The plaintiffs seek to establish a class action on behalf of other purchasers of Mass Mutual "vanishing premium" life insurance policies.

LAW

In moving to dismiss, the defendant claims that the plaintiffs have failed to meet the minimum jurisdictional amount of \$50,000.00 as set forth in 28 U.S.C. § 1332. However, the plaintiffs have alleged that they were compelled to cancel their life insurance policies as a result of the defendant's fraudulent activities. Since the face value of the policies exceed \$50,000.00, the court finds that the minimum jurisdictional amount has been properly alleged.

The defendant has likewise moved to dismiss the plaintiffs' causes of action for fraud on the basis that the plaintiffs have failed to state a claim. It is well-settled that allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b); Guidry v. Bank of LaPlace, 954 F.2d 278, 288 (5th Cir. 1992). However, what constitutes particularity differs with the facts of each case, and therefore, the Fifth Circuit has never set forth the requirements of Rule 9(b) with any great detail. Id. In reviewing the plaintiffs' complaint, the court finds that although the allegations do not set forth the alleged fraudulent conduct in minute detail, the allegations are sufficient to apprise the defendant of the plaintiffs' claims of fraud. The remaining details not addressed in the plaintiffs' complaint may be readily ascertained through the discovery process.

The defendant has further moved to dismiss the plaintiffs' claims on the grounds that the three year statute of limitations has run, since the policies in question were purchased in August of 1985. Under Mississippi law, a cause of action for fraud accrues on completion of the sale induced by the false representation or upon consummation of the fraud. Black v. Carey Canada, Inc., 791 F. Supp. 1120, 1123 (S.D. Miss. 1990). However, the plaintiff has alleged specific acts of fraudulent concealment which, if proven, would act to toll the statute of limitations pursuant to the provisions of Miss. Code Ann. § 15-1-65. See Black, 791 F. Supp.

at 1123 n.2 (the time of accrual is tolled until the date of discovery of the fraud if the defendant commits further acts of fraud which conceal the plaintiffs' cause of action). Specifically, the plaintiffs have alleged that after they purchased the policies, they continued to receive correspondence from the defendant assuring them that their policies required no further premiums.

The defendant has moved to dismiss the plaintiffs' claim for intentional interference with contract rights on the grounds that the plaintiff has failed to allege that the defendant interfered with a contract between the plaintiff and a third party. Nichols v. Tri-State Brick and Tile, 608 So. 2d 324, 328 (Miss. 1992). The plaintiff has made no allegation that he cashed in a life insurance policy with another company for the purpose of purchasing a policy with Mass Mutual. Although other class members may have a cause of action for interference with contract rights, the inclusion of class allegations does not relieve the named plaintiff of a duty to meet the requirements for a cause of action himself. Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A July 1981). If the plaintiff has no standing individually, then no cause of action arises.

The defendant has likewise moved to dismiss the plaintiffs' cause of action for negligent misrepresentation on the grounds that the plaintiffs have failed to state an appropriate claim for

relief. The plaintiffs' complaint asserts that the Mass Mutual representative induced them to purchase the vanishing premium policies on the assurance that their premiums would "disappear" in ten and eleven years. However, it is well-settled that a representation of future conduct will not support recovery under a theory of negligent misrepresentation. Cockerham v. Kerr-McGee Chem. Corp., 23 F.3d 101, 104 (5th Cir. 1994); Bank of Shaw v. Posey, 573 So. 2d 1355, 1360 (Miss. 1990).

Finally, the defendant has moved to dismiss the plaintiffs' cause of action for deceptive sales practices. The defendant asserts that Miss. Code Ann. § 83-5-35 does not provide a private right of action to seek redress for deceptive sales practices. The plaintiffs, however, do not claim to be suing under § 83-5-35, but rather contend that such allegations of deceptive sales practices were included for the benefit of other class members who might have deceptive sales practice claims based on their own state's law. As the Fifth Circuit Court of Appeals held in Brown, supra, the plaintiff must have grounds himself for the cause of action brought by him, whether other potential class members do or not. Accordingly, as with the claim for interference with contract rights, the court finds that the claim for deceptive sales practices should likewise be dismissed.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiffs' claims for intentional interference with contract rights, deceptive sales practices and negligent misrepresentation should be dismissed. The remainder of the defendant's motion to dismiss, as well as the defendant's request for oral argument should be denied.

An order will issue accordingly.

THIS, the _____ day of July, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE